SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7645

MICHAEL C. SLOAN
DIRECT DIAL 202-295-8458
MCSLOAN@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

June 11, 2001

VIA COURIER

Ms. Janice Myles
Common Carrier Bureau
Federal Communications Commission
Room 5-C327
445 12th Street, SW
Washington, D.C. 20554

Re: Joint Comments of El Paso Networks, LLC and Global Broadband, Inc. in Opposition to the Joint RBOC Petition to Remove High Capacity Loops and Transport from the Mandatory Unbundling List (FCC Docket No. 96-98)

Dear Ms. Myles:

Please find enclosed a courtesy copy of the above captioned filing that was electronically filed with the Commission earlier today. Additional copies have been provided to the parties listed on the attachment. Please do not hesitate to call me at (202) 295-8458 if you have any questions.

Very truly yours,

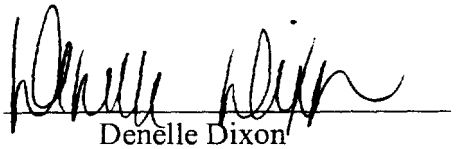
Michael C. Sloan

Michael C. Sloan

cc: Service List
Josh Bobeck
Patrick Donovan

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of El Paso Networks, LLC and Global Broadband, Inc. have been served by Hand Delivery and First Class Mail to the persons on the attached list.



Denelle Dixon

Date: June 11, 2001

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commissions
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

VIA HAND DELIVERY

Dorothy Atwood
Chief, Enforcement Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W. - Suite 5A848
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michael J. Copps, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Samuel Feder
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Jordan Goldstein
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Kyle Dixon
Office of the Chairman
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Jodie Donovan-May
Common Carrier Bureau
Federal Communications Commissions
The Portals - 445 Twelfth Street, S.W.
Washington, DC 20554

VIA HAND DELIVERY

Kathleen Q. Abernathy, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michelle Carey
Chief, Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

Brent Olsen
Deputy Chief
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

ITS Inc.
The Portals - 445 12th Street, SW
Washington, DC

VIA MAIL

Gary L. Phillips
Roger K. Toppins
Paul K. Mancini
SBC Communications, Inc.
1401 Eye Street, NW - Suite 1100
Washington, DC 20005

VIA HAND DELIVERY

Kathy Farroba
Deputy Chief
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

Glen Reynolds
Associate Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, D.C. 20554

VIA MAIL

Jeffrey S. Linder
Wiley, Rein & fielding
1776 K Street, NW
Washington, DC 20006

VIA MAIL

Michael E. Glover
Edward Shakin
Verizon Telephone Companies
1320 North Court House Road - 8th Floor
Arlington, Virginia 22201

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

JOINT COMMENTS OF EL PASO NETWORKS, LLC AND GLOBAL BROADBAND, INC.

Andrew D. Lipman
Eric J. Branfman
Robin F Cohn
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 424-7500
Facsimile: (202) 424-7645

Counsel for El Paso Networks, LLC and
Global Broadband, Inc.

Dated: June 11, 2001

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

JOINT COMMENTS OF EL PASO NETWORKS, LLC AND GLOBAL BROADBAND, INC.

Pursuant to Public Notice,[1] El Paso Networks, LLC ("EPN") and Global Broadband, Inc. ("Global Broadband"), through the undersigned counsel, respectfully submit these comments responding to the Joint Petition filed by Verizon, BellSouth and SBC on April 5, 2001 ("Joint Petition"). Contrary to the Joint Petition's contentions, there is a continuing need to maintain dedicated inter-office transport and high capacity loops (including dark fiber transport and loops) on the list of nationally available unbundled network elements ("UNEs"). Accordingly, the Commission should summarily reject the Joint Petition.

---

[1] *See Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, DA 01-911 (April 10, 2001), *extension of time granted, Common Carrier Bureau Grants Motion for Extension of Time For Filing Comments and Reply Comments on BOC Joint Petition Regarding Unbundled Network Elements*, CC Docket No. 96-98, DA (01-1041) (April 23, 2001) (setting June 11, 2001 filing date); *see also, Common Carrier Bureau Requests Comment on Crandall Declaration*, CC Docket No. 96-98, DA 01-1211 (May 14, 2001) (seeking comment on additional issue).

SUMMARY

EPN and Global Broadband are competitive LECs who strongly object to the Joint Petition's legally groundless and improper attempt to further limit the market entry alternatives available to new entrants by proposing that the Commission remove high capacity loops and dedicated transport (including dark fiber) from the list of available UNEs that must be provided by incumbent LECs.

EPN offers wholesale telecommunications services to its customers, who generally are themselves providers of telecommunications or information services (or both). The company's goal is to enable its customers to compete effectively in their respective markets. Toward that end, EPN's current or planned offerings include a full suite of services from collocation to enhanced Internet access, as well as a variety of value-added services that will be unique to the marketplace. Currently, EPN is operating its network in Austin, Dallas, and San Antonio, Texas. Its networks in Houston and Fort Worth, Texas are near completion. EPN relies heavily on the ability to obtain UNEs, including high capacity loops, sub-loops, and dedicated transport (including dark fiber loops and transport) from the ILEC in order to construct its network and serve its customers. In connection with its five-city network deployment in Texas, EPN has also collocated equipment in a large number of SWBT's central offices.

Global Broadband is a facilities-based integrated competitive LEC and provider of high-speed Internet access and voice services utilizing optical networking technology. Global Broadband currently provides service in New York and has deployed a SONET fiber ring comprised wholly of dark fiber obtained from Verizon, one of the joint petitioners. Global Broadband is collocated in several Verizon central offices in connection with its provision of service in New York.

As fully explained herein, EPN and Global Broadband strenuously oppose the Joint Petitioners' unjustified attempt to persuade the Commission to remove high-capacity loops and dedicated transport from the list of UNEs that ILECs must lease to competitive LECs for the following reasons: (1) the Joint Petition's procedural infirmities require its immediate rejection; (2) the Joint Petitioners have not demonstrated any credible legal basis for the draconian relief sought in the Joint Petition; (3) the business operations of competitive entrants such as EPN and Global Broadband would be impaired and adversely affected if high capacity loops and dedicated transport, including dark fiber, are deleted from the list of required UNEs that must be made available to competitive entrants at cost-based rates.[2]

ARGUMENT

I. THE JOINT PETITION MUST BE REJECTED ON PROCEDURAL GROUNDS

Joint Petitioners request that the Commission eliminate high-capacity loops[3] and all dedicated transport,[4] including dark fiber,[5] from the list of UNEs that incumbent LECs must lease to

---

[2] EPN is also filing comments in response to the Joint Petition as part of the Coalition of Competitive Fiber Providers.

[3] Although Joint Petitioners seek to remove "high-capacity loops" from the UNE list, they do not cite a specific rule that defines which loops they seek to exempt from unbundling obligations. The FCC rule governing unbundling of the local loop (47 C.F.R. § 51.319(a)) encompasses standard copper, high capacity, and dark fiber loops. The Joint Petitioners have only identified high capacity loops in their petition. Therefore, if the Commission finds that any further consideration of the petition is appropriate, it should limit its inquiry to high capacity loops and require Joint Petitioners to amend their filing if they actually seek to terminate the unbundling requirements for dark fiber loops. *See* Section IV, below.

[4] FCC rules define dedicated transport as "incumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not limited to DS1, DS3, and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers." 47 C.F.R. § 51.319(d)(1)(A).

CLECs at cost-based rates under Sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). The Petition defines "high capacity" as any facility at DS-1 speed and higher.[6] As a threshold matter, the petition is procedurally infirm and should be summarily rejected without further consideration of the Joint Petitioners' claims.

In the *UNE Remand Order*, the Commission evaluated and rejected similar proposals to precipitously eliminate UNEs from the national list.[7] Instead, the FCC determined it would review the required list of UNEs every three years,[8] and explicitly considered and discarded alternative proposals that would have modified the review period from to various intervals ranging from two years to five.[9] Acknowledging the rapid changes in technology, competition, and the economic conditions of the telecommunications market,[10] the FCC nevertheless determined that a triennial review process was appropriate and could begin after approximately two years of experience in order to be completed within the three-year interval.[11] Therefore, at the

---

[5] FCC rules define dark fiber transport at "incumbent LEC optical transmission facilities without attached multiplexing, aggregation or other electronics." 47 C.F.R. § 51.319(d)(1)(B).

[6] Joint Petition at 1.

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1196*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*") at ¶¶ 148-52.

[8] *Id.* at ¶ 151.

[9] *Id.* at ¶¶ 150, n.266, 151, n. 269. The triennial UNE review rule can be contrasted with the FCC's access pricing flexibility rules that permit petitioners to request pricing flexibility at any time. *See* 47 C.F.R. § 1.774.

[10] *UNE Remand Order* at ¶ 148.

[11] *Id.* at ¶ 151, n. 269.

earliest, consideration of the Joint Petitioners' request should not occur until two years after the effective date of the rules adopted in the *UNE Remand Order*.

In a transparent attempt to sidestep the triennial UNE review rule, Joint Petitioners request FCC "action" on the basis of changed circumstances. Joint Petitioners have not styled their petition as a request for rulemaking, declaratory ruling, forbearance or waiver, nor have they endeavored to cite the procedural rule under which they claim that Commission may act on their requests. NewSouth Communications persuasively argues why the FCC should dismiss the Joint Petition for failing to comply with the Commission's declaration that it would not consider dropping UNEs for three years. EPN and Global Broadband support NewSouth's motion and urge the Commission to dismiss the Joint Petition for the reasons advocated by NewSouth. EPN and Global Broadband particularly object to the time and expense necessary to respond to the Joint Petition.

Furthermore, by filing the Petition a mere 14 months after being required to make some of the new UNEs available,[12] Joint Petitioners improperly request, in substance, reconsideration of the triennial UNE review process.[13] Because requests for periodic *ad hoc* review of the national UNE list was evaluated and rejected in the *UNE Remand Order*,[14] such a request is

---

[12] Although many of the rules adopted in the *UNE Remand Order* became effective on February 17, 2000, some, including dark fiber transport, did not become effective until May 18, 2000. *UNE Remand Order* at ¶ 526.

[13] *See e.g., Federation of American Health Systems Petition for Declaratory Ruling, Or in the Alternative, Petition for Waiver*, 9 FCC Rcd 3303 (1994) (petition for declaratory ruling seeking relief the FCC had considered and rejected in rulemaking one year prior to petition was in substance an untimely petition for reconsideration).

[14] It makes no difference that only one, rather than "numerous," petitions for *ad hoc* review of the list have been filed since the *UNE Remand Order*. In adopting the triennial review process, the FCC rejected *ad hoc* review of any single petition. Further, if the FCC were to grant the Joint Petition, it would surely encourage others to file similar petitions.

untimely asserted in the instant case.[15] The Commission should reject the Joint Petitioners' claims and decline to consider the substance of the petition, or any other similar petitions to "de-list" unbundled network elements subject to unbundling, until February 2002. At that time, the Commission should start the process of compiling information that can be used in a Notice of Proposed Rulemaking, with the goal of concluding the rulemaking by February 2003. The Joint Petitioners' demand that the Commission overturn its prior ruling and remove dedicated transport and high capacity loop facilities from the list of required UNEs despite its imposition of a three-year review period is legally insufficient and must be rejected.

II. THE JOINT PETITION FAILS TO DEMONSTRATE ANY LEGAL BASIS TO WARRANT REMOVAL OF DEDICATED TRANSPORT AND HIGH CAPACITY LOOPS FROM THE LIST OF AVAILABLE UNEs

A. The Joint Petition Must Be Rejected Pursuant to Existing Law Under the *UNE Remand Order*

Section 251(d)(2) of the Act requires the Commission to "determin[e] what network elements" incumbent LECs must "ma[k]e available" to competitive LECs pursuant to the unbundled access obligations imposed on incumbent LECs by section 251(c)(3). The Act expressly stipulates that incumbent LECs must provide requesting carriers with access to unbundled network elements if lack of access to those elements would "impair" the competitive LECs' ability to provide the services they seek to offer.[16] The Commission's regulations implementing this provision track the statutory language,[17] and require the Commission to "tak[e] into consid-

---

[15] The *UNE Remand Order* was published in the Federal Register on January 18, 2000. Under FCC rules, the date of Federal Register publication is the date of public notice. 47 C.F.R. § 1.4(b)(1). Section 405 of the Act provides that a petition for reconsideration must be filed within thirty days of the date of public notice, in this case, February 17, 2000.

[16] 47 U.S.C. § 251(d)(2).

[17] *See UNE Remand Order* at ¶ 51 ("conclud[ing] that the failure to provide access to a network element would "impair" the ability of a requesting carrier to provide the services it

eration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier."[18] In determining whether alternative sources of network elements are actually available as a practical, economic, and operational matter, the Commission looks to specific factors including cost, ubiquity, quality, timeliness, and operational impediments.[19]

In the *UNE Remand Order*, the Commission held that high-capacity loops and transport are not generally available outside the incumbent LECs' network and that competitive LECs would be impaired without unbundled access to incumbent loop and transport facilities.[20] In so ruling, the Commission considered and rejected many, if not all, of the same arguments that the Joint Petitioners make in the instant petition. For example, the Commission expressly rejected incumbent LEC arguments that, because some competitive LECs "have successfully provisioned [high capacity] loops to certain large business customers," the Commission should refrain from unbundling such loops altogether.[21] In an analysis that applies with equal force today, the Commission explained that:

> Building out any loop is expensive and time-consuming, regardless of its capacity. That some competitive LECs, in certain instances, have found it economical to serve certain [large] customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those particular customers. This evidence tells us nothing about the customer the competitor would like to serve but cannot because the cost of

---

seeks to offer if ... lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer").

[18] *Id.*

[19] *See UNE Remand Order* at ¶¶ 62-100.

[20] *See id.* at ¶¶ 165-201 (loops); ¶¶ 319-80 (transport).

[21] *Id.* at ¶ 184.

> building a loop from the customer premises to the competitive LEC's switch is prohibitive.[22]

The Commission further observed that "the wire facility used for transmission of the traffic [in, for example, a DS1 loop] is indistinguishable from any other copper wire."[23] It also found that mobile telephones and fixed wireless services do not offer competitive LECs a functionally comparable alternative to the incumbents' local loops, and that the availability of these services did not obviate the competitive LECs' legal right to access the incumbents' networks.[24]

The Commission similarly found that lack of access to unbundled interoffice transport impairs a carrier's ability to provide the services it seeks to offer.[25] Once again, it discarded many of the claims that the RBOCs have recycled for the instant Joint Petition. For example, the Commission took notice of competitive LEC deployments of "interoffice transport facilities along selected point-to-point routes, primarily in dense market areas," but found that "these facilities are not available, as a practical, economic, and operational matter, such that a requesting carrier's ability to provide the services it seeks to offer would not be impaired without access to the incumbent's ubiquitous interoffice transmission facilities."[26] The Commission specifically ruled that "the competitive transport facilities that currently exist do not interconnect *all* of an incumbent LEC's central offices," thus *per se* failing the ubiquity requirement of the impairment test.[27]

---

[22] *Id.*

[23] *Id.* at ¶ 176.

[24] *Id.* at ¶ 188.

[25] *Id.* at ¶ 332.

[26] *Id.* at ¶ 333.

[27] *Id.* (emphasis added).

B. The USTA "Fact Report" Relied on by the Joint Petitioners Fails to Justify the Relief Sought in the Joint Petition

Despite the Commission's recent findings that interoffice transport and high-capacity loops are required elements on the national UNE list and that the list is to remain intact for a three-year period, the Joint Petitioners aver that the state of local competition has markedly changed since the Commission issued the *UNE Remand Order*. Exhaustively citing to a "Fact Report" prepared by a USTA attorney, the Joint Petitioners assert that alternatives to the ILEC dedicated transport and high capacity loop UNEs are "ample" and that removing these elements from the national UNE list would not materially impair a CLEC's ability to provide telecommunications services.[28] Contrary to the joint petitioners' claims, the "Fact Report" provides no persuasive basis for eliminating dedicated transport and high capacity loops as required UNEs and the Commission should find that the Joint Petition lacks any credible empirical foundation.

The "Fact Report" does little more than restate and recast data in an unsubstantiated and biased manner. The lack of persuasiveness of the Joint Petitioner's "Fact Report" is underscored by the fact that the Commission evaluated and rejected considerable USTA-supplied evidence regarding competitive fiber network deployment when preparing the *UNE Remand Order*. In many cases, the data cited by the Joint Petitioners is similar to the data that has already been discarded by the Commission. For example, according to the USTA evidence cited in the *UNE Remand Order*, "competitors have deployed nearly 30,000 route miles of fiber within the top 50 MSAs,[29] have competitive presences in 47 of the top 50 MSAs,[30] and have deployed fiber in all

---

[28] Joint Petition at 1-2.

[29] *UNE Remand Order* at ¶ 334.

[30] *Id.* at ¶ 335.

but 15 of the MSAs ranked between 50 and 150.[31] USTA also supplied evidence of the number of collocation arrangements in many incumbent LEC wire centers, which the incumbents asserted signified the availability of competitive transport at or "nearby" the majority of "densely" populated wire centers.[32]

The Commission unequivocally rejected the significance and accuracy of this data, noting that "we are not persuaded that the incumbents' data accurately reflects the extent to which alternatives are actually available to competitors."[33] Notably, the Commission rejected the evidentiary *significance* of USTA's 50,000-foot summary statistics, finding that "only at a granular, wire center-by-wire center level does the record show the presence of competitive alternatives to the incumbent's interoffice transport."[34] Thus, the Commission noted "that the 'fiber frenzy' and 'bandwidth markets' cited by the incumbent LECs *are largely limited to portions of inter-city, long-haul networks that do not ubiquitously reach the interoffice segments of the incumbent LEC's network.*"[35] The Commission also put USTA evidence regarding the deployment of competitive fiber networks "nearby" incumbent LEC wire centers in a more appropriate perspective: "We note that the incumbents do not explain what is meant by fiber that is "nearby." Nor do incumbents explain how having fiber "nearby" reflects the availability of ubiquitous transport alternatives."[36]

---

[31] *Id.*

[32] *Id.* at ¶ 336.

[33] *Id.* at ¶ 341.

[34] *Id.*

[35] *Id.* at ¶ 350 (emphasis added).

[36] *Id.* at ¶ 342.

Instead of bolstering the Joint Petition and providing an evidentiary basis to support the relief sought by the joint petitioners, the "Fact Report" merely recycles most of the arguments presented to and rejected by the Commission 18 months ago, albeit with (factually unreliable) updates regarding the increasing extent of competitive facility deployments. With respect to the availability of alternative facilities, the "Fact Report" presents summary statistics totally lacking in the wire center-by-wire center "granularity" that the Commission said was necessary to evaluate the actual availability of alternative facilities.[37] Similarly, the RBOCs repeat data regarding the extent of competitive fiber deployments that pass "nearby" incumbent LEC wire centers and large commercial buildings, despite the Commission's criticisms of such data in the *UNE Remand Order*.[38]

The bulk of the "Fact Report" purports to document the extent of competitive fiber network deployments around the country. In the view of the Joint Petitioners, CLECs, wholesale suppliers, and interexchange carriers, as well as mysterious "tiny robots," are rapidly constructing fiber networks in cities throughout the country. There is, however, no reliable factual basis for the Joint Petitioners' claim that CLECs have deployed over 200,000 route miles of local fiber, "an increase of more than 36 percent" from the 160,000 route miles in-place "[a]t the time of the UNE Remand proceedings."[39]

The USTA data employed by the Joint Petitioners are derived from inappropriate use of statistics reported in the *CLEC Report 2001*, prepared by the New Paradigm Resources Group

---

[37] *See UNE Remand Order* at ¶ 341.

[38] *Id.* at ¶¶ 341-342.

[39] "Fact Report" at 10. It is unclear how the 160,000 mile figure quoted in the Joint Petition relates to the 30,000 mile figure the RBOCs claimed competitors had deployed in the *UNE Remand* proceeding. *See UNE Remand Order* at ¶136.

("NPRG Report"). As used in this context, the NPRG data do not constitute a reliable estimate of local competitive fiber deployments.[40] Indeed, the NPRG data do not even purport to measure *local* fiber deployment exclusively. Significantly, it is clear that the NPRG data includes both long haul and local fiber in one aggregated measure for several, if not most of the companies on the list. For example, the NPRG Report states that Winstar, a company now in Chapter 11 bankruptcy, is the largest provider of competitive fiber, with 22,000 miles of fiber deployed around the country. However, according to the company's March 10, 2000 10K, only 6,000 miles of these facilities are local, intra-city deployments. The statistics for the purportedly second largest provider, McLeodUSA, are likewise deceptive. The NPRG data indicates that McLeod has deployed 21,622 route miles of fiber. The company itself, however, reports that only one-quarter its total fiber deployments are for local facilities.[41]

Because not all companies make information on their network deployments publicly available, it is impossible to know the extent to which the NPRG data reports a combined figure for both local and long-haul fiber deployments. Examination of the data reported for several other companies listed on the table, however, indicates that the problem is widespread. For example, it is clear that the 16,000 route miles reported for Level 3, cited by NPRG as the eighth largest provider, does not include *any* local facilities.[42] Similarly, both NEON's and Telergy's

---

[40] In this regard, it must be noted that the table from which the data comes is titled "Size of Competitive Networks – Route Miles," and apparently makes no attempt to distinguish between local versus long-haul fiber deployments.

[41] *See* http://www.mcleodusa.com/html/ir/presentations.php3 (March 30, 2001 presentation to Morgan Stanley Global Communications Conference – slide titled "One Functional Network) (visited May 30, 2001).

[42] *See* http://www.level3.com/us/info/network/networkmap (reporting that the company plans to build a 16,000 mile *intercity* network (corresponding to the figure reported by NPRG), adding that the Company will then "build local fiber networks in most of the markets where their services are offered." Thus, local *intra*-city facilities are included in the 16,000 mile figure.)

networks include substantial long-haul facilities that appear to be subsumed in the total fiber mile figure reported by NPRG.[43]

It is notable that the Joint Petitioners rely almost exclusively on the "Fact Report" in lieu of more reliable, less skewed data (such as information obtained directly from CLECs and other telecommunications companies and data reported to the FCC) which conceivably could show that competitive entrants have made the astonishing inroads claimed by the Joint Petitioners since the *UNE Remand Order* was released. In the absence of such an adequate evidentiary foundation, the Commission must find that the Joint Petitioners have failed to present any credible proof in support of their position that high capacity loops and dedicated transport should be removed from the listed of required UNEs.

III. COMPETITIVE LECS WILL BE IMPAIRED FROM SERVING CUSTOMERS IF DEDICATED TRANSPORT AND HIGH CAPACITY LOOPS ARE ELIMINATED AS UNEs

As stated in Section II (A), the Commission's *UNE Remand Order* found that loops and transport are non-proprietary UNEs to which the "impair" test applies to determine whether ILECs should be required to provide the elements at cost-based rates. The Commission described the "impair" test in the *UNE Remand Order* as follows:

> We conclude that the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the service it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier,

---

[43] For Neon, *See* http://www.neoninc.com/page.cfm?contentID (stating that the "NEON network delivers connectivity to five tier-one cities and 21 second tier cities in the Northeast and Mid-Atlantic states"); for Telergy, *See* http://www.telergy.net/about_us/network (chart depicting Telergy's existing and planned long-haul network). Given that Telergy has local facilities in-place only in New York City, Syracuse, Buffalo and Albany, it is clear that the 1,500 route miles reported by NPRG includes some long-haul fiber.

> lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.[44]

As noted in Section II (A), the Commission evaluates specific factors including cost, ubiquity, quality, timeliness, and operational impediments in considering whether alternative sources of network elements are actually available as a practical, economic, and operational matter.[45]

In reaching its conclusion that high capacity loops and dedicated transport are required elements of the national UNE list, the Commission held that these elements are not generally available outside the incumbent LEC network and that competitors would be impaired without access to them.[46] Because Joint Petitioners have not demonstrated that the competitive landscape has changed so dramatically since issuance of the *UNE Remand Order* as to warrant removal of these elements from the list of required UNEs, the Commission should reject the Joint Petition.

EPN and Global Broadband strongly urge the Commission to find that the Joint Petitioners' claims are meritless, as the Commission's reasoning in the *UNE Remand Order* applies with (at least) equal force today. Although the unbundling rules adopted in the *UNE Remand Order* have increased opportunities for CLECs to compete with ILECs, the ILECs continue to frustrate the pace of competition and erect legal, regulatory, and operational obstacles at every turn. In addition, the market conditions described by the Commission in the *UNE Remand Order* have considerably declined since the ruling was issued. What has not changed is the necessity that fledgling competitors such as EPN and Global Broadband have for obtaining UNEs from ILECs to provide service to their customers.

---

[44] *UNE Remand Order* at ¶ 51.

[45] *UNE Remand Order* at ¶¶ 62-100.

[46] *UNE Remand Order* at ¶¶ 165-201 (loops); ¶¶ 319-380 (transport).

As new competitors who lack the established facilities possessed by incumbent monopolists, both EPN and Global Broadband depend heavily on the use of UNEs from ILEC networks. Both companies have obtained high capacity loops and dedicated transport from ILECs in the states in which they operate, and have in particular relied extensively on the use of ILEC dark fiber in beginning to execute their business plans. The period of regulatory certainty which the Commission sought to ensure by ruling that the required UNE list would not be re-examined for three years is critical to new entrants such as EPN and Global Broadband, both of whom are in the process of rolling out service to their customers in various locations. Both companies would be greatly disadvantaged if the national UNE list was suddenly modified and curtailed mid-stream, as the Joint Petitioners attempt to convince the Commission to do. Indeed, although the Commission is entitled, as a procedural matter, to reconsider the UNE list eighteen months from now, EPN and Global Broadband are confident that local competition will require that that all three UNEs remain available to competitors for the foreseeable future.

In the experience of both EPN and Global Broadband in providing service in Texas and New York, ILECs are usually the only source for obtaining loops and transport, including dark fiber. Although both companies contemplate the gradual construction of their own facilities provided that the expected demand exists to justify the economic investment, new market entrants are not likely to achieve the ubiquity and economies of scale possessed by the ILEC. In addition, even in areas where a CLEC believes the investment may be justified to construct limited facilities, access to unbundled loops is still required to provide immediate service to end-user customers. As the Commission has recognized, "overbuilding the incumbent LEC's loops would embroil the competitor in lengthy rights-of-way disputes, and would require the unneces-

sary digging up of streets."[47] Thus, the Commission properly found that "construction of new facilities would – at the least – materially delay competitors' ability to bring their services to consumers."[48] Nowhere is this statement more true than in California, where two of the Joint Petitioners, SBC and Verizon, operate as incumbent LECs, and new entrants such as EPN and Global Broadband are currently prohibited from building their own facilities to serve customers. Since 1999, the California Public Utilities Commission has not authorized *any* new entrants to construct new telecommunications facilities, except equipment to be placed in existing structures and conduits.[49]

Commencing with applicants who filed CPCN applications during the second quarter of 1999, the California PUC deferred granting full facilities-based authority pending resolution of certain environmental issues.[50] Instead, the California PUC granted new market entrants only *limited* authority to operate facilities in the state.[51] In contrast, incumbents such as SBC and

---

[47] *UNE Remand Order* at ¶ 186.

[48] *Id.*

[49] CPUC Decision 99-10-025, Oct. 7, 1999.

[50] The CPUC is engaged in a proceeding to determine how it will apply the California Environmental Quality Act ("CEQA") to facilities based telecommunications providers. Under CPUC rules, a report or notice of proposed rulemaking must be issued by October 2001. Until the CPUC resolves how CEQA applies to facilities based telecommunications providers, we understand that petitions for full facilities based authority will not be granted. We also understand that the CPUC will consider requests from providers with a limited facilities based CPCN to construct facilities along a specified route, if the application is accompanied by an acceptable environmental assessment; but that the CPUC has not actually ruled on any applications filed with such an assessment since mid-1999.

[51] CPUC Decision 99-10-025, Oct. 7, 1999. Carriers with "limited facilities-based" authority are prohibited from engaging in any construction of buildings, towers, conduits, poles, or trenches, and can offer services only through resale or use of their own facilities that are installed solely within existing structures. If carriers with limited facilities-based authority seek to offer expanded service involving construction activities beyond the limited scope approved in their

Verizon have blanket authority to tear up streets to lay fiber and construct new facilities wherever they see fit. It is inconceivable that the Commission could consider the relief suggested in the Joint Petition at a time when competitive LECs are effectively barred from constructing alternative facilities in the largest state in the nation.[52] Since the Joint Petitioners have presented no credible basis to invalidate the Commission's recent determination that high capacity loops and transport are required elements on the national list of UNEs, their request should be denied.

IV. ANY CLAIM BY THE JOINT PETITIONERS THAT DARK FIBER LOOPS AND TRANSPORT SHOULD NOT BE MADE AVAILABLE AS UNEs MUST BE REJECTED

By its express terms, the Joint Petition seeks to convince the Commission to remove high-capacity loops and dedicated transport from the national UNE list.[53] Although the Joint Petitioners specify that their definition of dedicated transport includes "dark fiber transport,"[54] the Joint Petition is ambiguous with respect to whether deletion of dark fiber loops from the mandatory UNE list is contemplated. If the Commission finds that the Joint Petition should be entertained despite its procedural infirmities,[55] and the Joint Petitioners do in fact advocate the termination of mandatory unbundling of dark fiber loops, they must first be required to amend their filing in order to specifically address dark fiber issues. In any event, despite the ambiguity of the Joint Petition, any unjustified attempt to "de-list" dark fiber should be summarily rejected.

CPCN, they must file a new application for facilities-based CPCN authority and comply with any applicable CEQA requirements for project review and approval.

[52] If the Commission were, despite the procedural and evidentiary defects in the Joint Petition, to grant the relief the RBOCs seek, it would at a minimum have to exclude California from any such relief.

[53] Joint Petition at 1.

[54] Joint Petition at 1.

[55] *See* Section I.

Dark Fiber is "fiber that has not been activated through connection to the electronics that 'light' it, and thereby render it capable of carrying communications services."[56] In the *UNE Remand Order*, the Commission found that dark fiber must be made available to requesting CLECs at cost-based rates whether it is found in the ILECs' loop plant or in the transport network.[57] With respect to loops (including dark fiber loops), the Commission stated that "requiring carriers to obtain loops from alternative sources would materially raise entry costs, delay broad-based entry, and limit the scope and timeliness of competitor's service offerings." It stated that such access "is essential for competition in the provision of advanced services."[58]

Given its relatively low cost and that fact that it is not "lit" by electronics, dark fiber (including both loops and interoffice transport) offers flexibility for CLECs with respect to the array of services they are able to provide by utilizing it. For new entrants such as EPN and Global Broadband, dark fiber obtained from ILECs is essential. As noted, dark fiber is not sufficiently available from other carriers such as to obviate the need for dark fiber UNEs. Global Broadband has deployed a SONET fiber ring in New York that is comprised entirely of dark fiber obtained from Verizon, and EPN currently utilizes SWBT dark fiber. Nor has EPN or Global Broadband sufficiently constructed its own dark fiber to be able to dispense with dark fiber UNEs.

As explained in detail herein, the Joint Petitioners have not demonstrated that their request to eliminate high capacity loops and dedicated transport (including dark fiber loops and transport) from the list of required UNEs has any merit. Even if fiber is available in limited areas from sources other than ILECs, the ILEC remains the only carrier with available facilities

---

[56] *UNE Remand Order* at ¶174.

[57] *See UNE Remand Order* at ¶¶ 196-199; ¶¶ 325-330. *See also* 47 C.F.R. §51.319(a)(1) (local loop, including fiber); 47 C.F.R. §51.319(d)(1)(B) (dark fiber transport).

[58] *UNE Remand Order* at ¶196.

everywhere. Furthermore, based on the experience of EPN and Global Broadband, providing service utilizing dark fiber would be prohibitively expensive without the advantage of cost-based UNEs. The Joint Petitioners' cavalier assertion that the competitive market has evolved to a state where ILEC UNEs are unnecessary because the fiber market is a "Field of Dreams" is grossly misplaced.[59] EPN and Global Broadband respectfully urge the Commission to uphold its directives from the *UNE Remand Order* and reject the Joint Petitioners' groundless requests.

CONCLUSION

For the aforementioned reasons, the Commission should reject the Joint Petition, deny all of the requested relief, and affirm its prior rulings that high capacity loops and dedicated transport (including dark fiber loops and transport) must be made available to requesting competitors at cost-based rates in accordance with applicable law.

Respectfully submitted,

/s/ Andrew D. Lipman

Andrew D. Lipman
Eric J. Branfman
Robin F. Cohn
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
Telephone (202) 424-7500
Facsimile: (202) 424-7645

Counsel for El Paso Networks, LLC, and
Global Broadband, Inc.

Dated: June 11, 2001

[59] *See* Joint Petition at 12.